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NO. 95-718

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RUDOLPH ALBINO,
Respondent

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When does a police officer have probable cause to arrest under the Fourth Amendment after observing a street corner transaction that he believes was a drug sale?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully prays that a writ of certiorari issue to review the order and judgment of the Supreme Court of Pennsylvania, entered on August 1, 1995.

OPINIONS BELOW

The August 1, 1995 per curiam order of the Supreme Court of Pennsylvania, reversing the judgment of the intermediate appellate court, the Superior Court of Pennsylvania, is reported at 664 A.2d 84 (Pa. 1995), and is reprinted in the Appendix at App. 1. The January 5, 1995 judgment and opinion of the Superior Court of Pennsylvania is reported at 438 Pa. Super. 562, 652 A.2d 953 (1995), and is reprinted in the appendix at App. 2-18. The September 2, 1993 opinion of the Court of Common Pleas of Philadelphia County is unreported, but is reprinted in the appendix at App. 19-38.

STATEMENT OF JURISDICTION

This is a state criminal prosecution where respondent filed a motion in

the trial court, the Philadelphia Court of Common Pleas, seeking to suppress crack cocaine and United States currency allegedly seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution. On May 24, 1993, the trial court suppressed the evidence, finding that it was the tainted fruit of an arrest lacking probable cause under the Fourth Amendment.

Upon appeal by petitioner, the Commonwealth of Pennsylvania, the intermediate state appellate court, the Superior Court of Pennsylvania, reversed the suppression order in a judgment and opinion dated January 5, 1995. Respondent filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. On August 1, 1995, the Supreme Court issued a one paragraph per curiam order granting the petition for

allowance of appeal, and summarily reversing the decision of the Superior Court. The court explained the reversal only by citing its recent decision in Commonwealth v. Banks, 658 A.2d 752 (Pa. 1995), a case decided exclusively under the Fourth Amendment.

The jurisdiction of this Court to review the final judgment of the Supreme Court of Pennsylvania, based exclusively upon its construction of the federal Fourth Amendment, is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable

> cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of Section 1 of the Fourteenth Amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A police officer, patrolling a beat in Philadelphia where he had worked for five years, saw respondent deliver small whitish objects, which he had kept stashed in a change purse in the waist of his pants, to a person in exchange for United States currency. Based upon his experience in this neighborhood, the officer believed that respondent had

just sold crack cocaine. After stopping respondent and seizing his change purse, the officer recovered eighteen vials of crack cocaine. The state trial court suppressed the cocaine, as well as cash seized from respondent incident to arrest, on Fourth Amendment grounds.

Petitioner appealed to the intermediate state appellate court, the Superior Court of Pennsylvania, which reversed the suppression order. Upon respondent's petition for discretionary review, however, the state Supreme Court, without benefit of briefing or oral argument, reversed Superior Court in a per curiam order. The Court explained its order only by citing its recent Fourth Amendment decision in Commonwealth v. Banks, 658 A.2d 752 (Pa. 1995).

Following his August 8, 1992 arrest, respondent was held for trial on

charges of possession of a controlled substance and possession of a controlled substance with the intent to deliver. 35 Pa. Cons. Stat. § 780-113(a)(16), (a)(30). The federal question was first raised on November 4, 1992, in respondent's "omnibus" pre-trial motion. In the motion, respondent sought to suppress his cocaine and cash on the ground that they were the fruits of an illegal arrest. A suppression hearing was held in the trial court on May 24, 1993. App. 41. Although respondent nominally sought suppression under both the federal and Pennsylvania constitutions, he never claimed to have greater privacy rights under the Pennsylvania constitution. Moreover, the trial court, Superior Court, and Supreme Court all decided the case based exclusively upon the Fourth Amendment.

The only witness at the suppression hearing was the arresting officer, Philadelphia Police Officer Gregory Meissler. Officer Meissler testified that on August 8, 1992, at approximately 12:55 p.m., he was conducting a drug surveillance of the 2900 block of North Mutter Street in Philadelphia. During the five years he had been assigned to patrol this section of Philadelphia, Officer Meissler personally had participated in at least forty drug arrests on this block. App. 44-47.

As Officer Meissler watched with binoculars, he saw respondent standing in front of 2900 North Mutter Street. A black female approached respondent and handed him United States currency. Respondent reached into the front waist area of his pants and removed a brown change purse. Respondent opened the purse, removed some small, whitish

objects, and handed them to the black female, who turned and left the area. App. 48-50, 56.

This exchange, the officer testified, was similar to hundreds of drug deals he had witnessed in this neighborhood. Although the officer was unable to conclusively identify the small whitish objects respondent had sold, he believed, based upon his experience, that they were vials of crack cocaine. App. 52-53.

Officer Meissler entered his patrol car and approached respondent, who was now sitting on the steps in front of 2901 North Mutter Street. After conducting a protective frisk, the officer pulled open the front of respondent's pants slightly and looked down, where he saw the brown change purse. At the officer's direction, respondent handed the purse to the officer. Inside the

purse, the officer found eighteen clear plastic vials, each of which contained an off-white chunky substance, which later tested positive for cocaine. Respondent was arrested and, incident to his arrest, the officer recovered thirteen dollars in United States currency. App. 53-55, 60-62.

The suppression judge specifically credited the officer's testimony. App. 72. The judge went on to "find as a fact that the objects observed were on the line of whitish, or non-descript, as opposed to having a particular color. Not necessarily white, but just as opposed to having a particular color." App. 72-72.[1] The suppression court

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[1]The suppression court's explanation of its finding as to the color of the objects apparently was in response to respondent's cross-examination of the officer. Respondent had elicited that, at the preliminary hearing, the officer had not mentioned that the objects were

(continued...)

nevertheless suppressed respondent's drugs and money on Fourth Amendment grounds, finding that they were the fruits of an arrest lacking probable cause. App. 73-74.

Upon petitioner's appeal, the state Superior Court reversed the suppression order on January 5, 1995. App. 2, 15. Respondent then petitioned for discretionary review in the Pennsylvania Supreme Court. On August 1, 1995, without benefit of briefing or oral

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[1](...continued)
white. Of course, the color of the objects was not relevant at the preliminary hearing, where no suppression issue was raised; indeed, the officer had not even been asked whether he had noticed the color of the objects. App. 58-60.

Whether the objects were white, as the uncontradicted evidence showed, or on the line of whitish as opposed to any other color, as the suppression judge construed the testimony, the fact remains that the color of the objects was consistent with crack cocaine -- an off-white substance.

argument, the Supreme Court issued a per curiam order reading as follows:

> AND NOW, this 1st day of August, 1995, it is hereby ordered that the Petition for Allowance of Appeal is GRANTED. It is further ordered that the decision of the Superior Court is hereby reversed. Commonwealth v. Banks, 658 A.2d 752 (1995).

App. 1. Banks is a case decided exclusively under the Fourth Amendment.

Petitioner then filed this certiorari petition.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD PROVIDE GUIDANCE ON ONE OF THE MOST FREQUENTLY LITIGATED AND IMPORTANT FOURTH AMENDMENT QUESTIONS OF THE DAY: WHEN DOES A POLICE OFFICER HAVE PROBABLE CAUSE TO ARREST A PERSON HE SEES MAKING A STREET CORNER EXCHANGE HE BELIEVES WAS A DRUG SALE.

The importance of the Fourth Amendment question at issue arises not from its singularity, but from its very

commonality. In America today, the tension between individual rights and legitimate law enforcement finds perhaps its most frequent expression in the question of when a patrolling police officer has probable cause to arrest after seeing what he believes was a drug sale. The probable cause standard is settled. But there has been little guidance from this Court as to what that standard means in concrete circumstances affecting the everyday lives of citizens and police. This case offers the Court an opportunity not only to offer guidance on a specific question crucial to the administration of criminal justice, but also to elucidate the meaning of probable cause -- which itself is the most important legal question under the Fourth Amendment.

The prosecution here arose from a typical street sale of crack cocaine, of

a kind that occurs thousands of times a day on urban streets in America. The facts are simple and familiar. A police officer, patrolling a beat he had worked for years, in an area where he had made numerous drug arrests, saw an exchange that he believed was a drug sale. He moved in, arrested the seller, searched him, and retrieved vials of crack cocaine. Respondent sought to suppress the drugs on the ground that the officer lacked probable cause. Not unusually, the various state courts reached different conclusions on the question. The suppression court excluded the drugs; the intermediate appellate court would have admitted them; ultimately, the state Supreme Court summarily excluded them.

The relative typicality of the case heightens, rather than diminishes, the importance of the Fourth Amendment

question. The street sale of drugs presents a unique problem to law enforcement. Typically, crimes arising from street drug sales can be prosecuted only if police retrieve the item sold or the stash from which it came. Retrieval, more often than not, results from a quick, on-the-spot decision to seize and search the person(s) involved. Not surprisingly, the crucial -- and often the only -- issue in such prosecutions is the lawfulness of the search and seizure.

The Fourth Amendment issue is made particularly difficult because of the very nature of street drug sales. The transaction is a crime only because of the item sold. But that item often is as tiny as a packet or a vial. Patrolling police officers who witness a sale rarely will be close enough to be able to specifically identify the item, which

is easily concealable in a person's palm. Furthermore, as a practical matter, police will have little or no opportunity to develop further information as to the criminal nature of the transaction. A police officer may simply happen upon the sale while on patrol in uniform and/or in a marked car. At the same time he detects the crime, his own presence may be detected: he must act quickly or not at all.

Even where surveillance is theoretically possible, it may be impractical. In addition to the commitment of manpower required to maintain a surveillance, the passage of time involved has serious consequences. First, the risk of detection by the seller or his confederates increases. Moreover, as a surveillance continues and further sales are made, the supply is depleted. Mandatory drug sentences

routinely depend upon the amount of the drug found; delay in apprehension, therefore, has serious consequences. Also, police who merely happen upon a street corner drug dealer cannot know how much of a supply remains: to await more sales runs the risk that the supply will be exhausted by the time police act. And, most importantly, each sale is a crime in itself: police who immediately recognize the criminal nature of the enterprise should be permitted to act immediately to end it.

The difficulty of the issue is further exacerbated by the inevitable nature of the police response. An apprehension following a street drug sale does not lend itself to a traditional "intermediate response," such as a stop and frisk for weapons. A weapons frisk is of no avail when the object being sought is not a weapon, but a tiny

vial or packet of drugs. To conclusively confirm or dispel their belief that the suspect was dealing narcotics, police need to see the goods. As is illustrated by this case -- where the officer "searched" only the exact area where he believed respondent was storing his drugs -- the search for those goods can be extremely narrow. Nevertheless, because such conduct still exceeds the scope of a Terry frisk, courts have uniformly characterized the intrusion as a full-blown "search" requiring probable cause. Thus, despite the myriad of factual variations in these cases, and the arguably tailored and limited police responses, the Fourth Amendment issue routinely boils down to a question of probable cause: did the transaction observed by police warrant an arrest?

The governing probable cause standard is stated easily enough: it

exists where the facts and circumstances are sufficient to warrant a person of reasonable caution in the belief that the suspect has committed a criminal offense.[2] But, as with many fundamental standards, its practical meaning is anything but clear. Indeed, probable cause often is explained by what it is not -- i.e., it requires less than a showing that the officer's belief is factually correct,[3] or "more likely true than false,"[4] or even sufficient to prove a prima facie case[5] -- or by

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[2]E.g., Illinois v. Gates, 462 U.S. 213, 231-32, 103 S. Ct. 2317, 2328-29 (1983); Texas v. Brown, 460 U.S. 730, 742-43, 103 S. Ct. 1535, 1543 (1983) (plurality opinion); Brinegar v. United States, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11 (1949).

[3]Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793, 2800 (1990).

[4]Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1543.

[5]Illinois v. Gates, 462 U.S. at 235, 103 S. Ct. at 2330.

describing a judicial approach -- i.e., practical, common sensical, viewed from the point of view of a trained police officer.[6]

It is difficult, if not impossible, to apply such broad standards with any degree of precision or uniformity except with reference to concrete examples. Indeed, the standard arguably is meaningless absent examples of its application to particular circumstances. This case, involving one of the most frequently litigated and troublesome questions of probable cause in America, presents this Court with an opportunity to provide state and lower federal courts with much-needed guidance on this central Fourth Amendment question.

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[6] Illinois v. Gates, 462 U.S. at 231-32, 103 S. Ct. at 2329, citing United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981).

The necessity for such guidance is made plain by the state Supreme Court decision below, which is impossible to square with any rational approach to probable cause. The exchange here had all the trappings of the standard street sale of cocaine. The objects sold were white or a "non-descript" whitish; crack cocaine, of course, is a whitish colored narcotic. Certainly the arresting officer, who had extensive experience in such matters, could tell whether the color of the objects was consistent with cocaine. The objects were small enough to fit within a change purse which itself was small enough to be hidden in the waist of respondent's pants. As is common knowledge, and as the officer here certainly knew, App. 53, crack cocaine is routinely packaged in tiny portions and sold on the street in vials or packets.

Moreover, no particular police expertise is required to recognize that this type of transaction -- a brief, street corner exchange of cash for a small object -- is the archetypal manner in which narcotics are most frequently sold in America. In contrast, no innocent commercial transaction is routinely made in such a fashion. The small whitish objects were stored by respondent in a change purse, rather than packaged in a fashion consistent with legitimate commercial goods. Nor did respondent display his goods on a table or a cart, as street vendors typically do in urban areas. He did not advertise them at all: they were secreted in a small change purse, which itself was hidden in his waistband. If the objects being vended were not drugs, why such secrecy? To a legitimate sales enterprise, the tactic would be suicidal. Illicit

trades such as drug dealing, however, require stealth and secrecy.

Finally, the sale occurred in a police district the officer had patrolled for five years, and on a block where he had participated in at least forty drug arrests. The officer had seen this type of drug exchange "hundreds" of times. That practical experience led him to conclude that this transaction, like so many he had seen in the past, involved the sale of cocaine. App. 44-47, 52-53.

Under any fair application of the probable cause standard, it is difficult to understand why the state Supreme Court held that probable cause was lacking. Arguably, in this day and age, the very nature of the transaction -- one consistent with a typical street drug sale and inconsistent with any other common street transaction -- alone

raised at least a "fair probability"[7] that respondent was selling illegal narcotics. When that fact is combined with the arresting officer's ability to see the size and whitish color of the items sold, as well as his specific familiarity with drug sales generally and the incidence of drug dealing on this very block, probable cause would seem to be overwhelming.[8]

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[7] Illinois v. Gates, 462 U.S. at 238, 103 S. Ct. at 2332; see also Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. at 2799.

[8] This Court has long recognized that crime problems common in the location at issue, of which police are aware, are an important factor in determining whether probable cause exists, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 884-85, 95 S. Ct. 2574, 2582 (1975); Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 1306-07 (1949); Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 287-88 (1925), as is the expertise and experience of the police officers involved. United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981) (police may rely on their

(continued...)

Nevertheless, the Pennsylvania Supreme Court -- without benefit of briefing or argument -- summarily found that the arrest was illegal. The court supported its ruling only by citing its own previous decision in Commonwealth v. Banks. But the unexplained citation to Banks confuses, rather than illuminates, the probable cause question.

Banks held that an exchange of money for an unseen object, combined with the defendant's flight upon spotting police, did not provide probable cause to arrest under the Fourth Amendment. 658 A.2d at 753-54. Here, there

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[8](...continued)
training and experience to draw "inferences and deductions that might elude an untrained person"). See also United States v. Montoya De Hernandez, 473 U.S. 531, 542, 105 S. Ct. 3304, 3311 (1985); United States v. Ortiz, 422 U.S. 891, 897, 95 S. Ct. 2585, 2589 (1975); United States v. Brignoni-Ponce, 422 U.S. 873, 884-85, 95 S. Ct. 2574, 2582 (1975); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

was no flight, which was not surprising since respondent was unaware that police had seen his exchange. But, unlike Banks, there were numerous additional, recognized factors which should have supported a finding of probable cause. First, the items sold were not "unknown:" they were whitish and small enough to fit in a change purse, and the officer believed they were vials of crack cocaine. Moreover, the prior incidence of drug dealing on this block and the arresting officer's experience distinguish Banks, where the officer had no particular experience in narcotics enforcement, and the area in question was not known for drug sales.[9]

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[9]Even if Banks were controlling factually, its probable cause analysis is problematic in its own right. This Court has recognized that "flight at the approach of ... law enforcement officers [is] strong indicia of mens rea;" when flight is coupled with specific

(continued...)

The Pennsylvania Supreme Court did not even acknowledge these differences, much less explain why they had no effect on the probable cause outcome. The effect of the holding is to preclude police from drawing the single most likely conclusion from conduct they see in areas with which they are intimately familiar. That the decision is wrong, and controls Fourth Amendment jurisprudence in the state, is bad enough. But

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[9](...continued)
knowledge on the part of the officer relating the suspect to a crime, probable cause exists. Sibron v. New York, 392 U.S. 40, 66-67, 88 S. Ct. 1889, 1904 (1968). See also 2 W. R. LaFave, Search and Seizure, § 3.6(d), at 62 & n.126 (2d ed. 1987) (collecting cases). Indeed, this Court has suggested that flight alone may justify a Terry stop. California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 1549 n.1 (1991). As the Banks dissent recognized, when that flight follows upon an officer's observation of a street-corner transaction which is a virtual copy-cat of a drug deal, there is a fair probability that the suspect was engaging in criminal conduct. See 658 A.2d at 755 (Castille, J., dissenting).

what is even worse, when a difficult-to-describe standard such as probable cause is at issue, is that it is unexplained.

This Court has emphasized that standards under the Fourth Amendment should be "workable for application by rank-and-file, trained police officers," "reasonable," and "objective." Illinois v. Andreas, 463 U.S. 765, 772-73, 103 S. Ct. 3319, 3325 (1983). At least in Pennsylvania today, however, the standard for probable cause approaches the arbitrary. The result is a state Fourth Amendment jurisprudence that is an analytical vacuum which serves neither to guide police nor to protect individual rights.

The state Supreme Court's inability even to articulate the basis for its decision is particularly distressing because the arrest found unlawful here unquestionably would have been approved

by other state and federal courts which have considered similar cases.[10] Indeed, even in less compelling cases -- i.e., where police are unable to identify the size and/or color of the object sold -- courts have found probable cause based upon the distinctive nature of this type of transaction, the officer's experience, and the high crime nature of the area. United States v. White, 655 F.2d 1302 (D.C. Cir. 1981); Commonwealth v. Santaliz, 413 Mass. 238, 596 N.E.2d 337 (1992).[11] See also Ellis v. State,

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[10] See, e.g., People v. McRay, 51 N.Y.2d 594, 416 N.E.2d 1015, 435 N.Y.S.2d 679 (1980) (delivery of glassine envelope, "a telltale sign of heroin," in high crime area, observed by police officer experienced in narcotics investigations, established probable cause).

[11] Accord, United States v. Taylor, 997 F.2d 1551 (D.C. Cir. 1993); United States v. Green, 670 F.2d 1148 (D.C. Cir. 1981); United States v. Davis, 561 F.2d 1014 (D.C. Cir. 1977), cert. denied, 434 U.S. 929, 98 S. Ct. 416 (1977).

573 So. 2d 724 (Miss. 1990) (no evidence of high drug area and officer did not see actual exchange; fact that officer saw conduct which looked like twenty-five or so other drug transactions he had seen itself held sufficient to arrest).[12]

These courts have embraced the teaching, rooted in this Court's holdings, that probable cause is a practical, common sense standard, which must be assessed through the eyes of those versed in law enforcement, based upon their experience in the areas they

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[12]In cases where courts have found probable cause lacking after a street corner exchange, the facts are far less compelling than those present here. For example, in Cunha v. Superior Court, 2 Cal. 3d. 352, 466 P.2d 704, 85 Cal. Rptr. 160 (1970), police saw the suspects walking together for some time before the transaction, and they did not see the object that was eventually exchanged for money. See also People v. Ratcliff, 778 P.2d 1371 (Colo. 1989) (officer saw exchange of unknown objects in area with history of drug activity).

patrol. The Pennsylvania Supreme Court's summary decision does not even pay lip service to these principles, much less apply them. The decision is thoroughly out of step with the Fourth Amendment jurisprudence that has developed nationally on this question. Review by this Court is independently warranted to resolve the conflict in this recurring Fourth Amendment area, which is of crucial importance to the administration of criminal justice.[13]

In its narrowest sense, review of the decision below is warranted to correct the erroneous Fourth Amendment jurisprudence prevailing in Pennsylvania. Review is independently appropriate to resolve a conflict on

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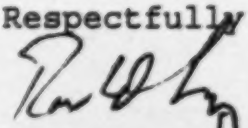
[13] See Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412 (1990) (certiorari granted to resolve conflict in state and federal courts over when anonymous tip may furnish reasonable suspicion for investigatory stop).

when probable cause exists to arrest for street drug crimes, a question which is litigated on a daily basis in courtrooms throughout the nation. But most importantly, this Court's review of the probable cause question in this everyday context affords the Court an opportunity to provide national guidance on the practical meaning of probable cause itself. For these reasons, review is required.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,



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DATE: October 30, 1995

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	:	No. 66 Eastern District Allocatur Docket 1995
	:	Petition for Allowance of
RUDOLPH ALBINO, Petitioner.	:	Appeal from the Superior Court

ORDER

PER CURIAM

AND NOW, this 1st day of AUGUST, 1995, it is hereby ordered that the Petition for Allowance of Appeal is GRANTED. It is further ordered that the decision of the Superior Court is hereby reversed. Commonwealth v. Banks, 658 A.2d 752 (1995).

Mr. Justice Montemuro is sitting by designation.

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RUDOLPH ALBINO	:	No. 2068 Philadelphia 1993

Appeal from the Order entered May 24, 1993 in the Court of Common Pleas of Philadelphia County, Criminal Division, No. 9209-2630

BEFORE: CIRILLO, BECK and HOFFMAN, JJ.

FILED: Jan. 5, 1995

OPINION BY CIRILLO, J:

The Commonwealth of Pennsylvania appeals from the order of the Court of Common Pleas of Philadelphia County, granting Rudolph Albino's motion to suppress 18 vials of crack cocaine. We reverse.

On September 8, 1992, Albino was charged with possession of a controlled substance and possession with intent to deliver a controlled substance. On November 11, 1992, Albino filed an omnibus pre-trial motion to suppress

evidence of crack cocaine seized from his person, claiming that the police lacked probable cause to arrest at the time that the search and subsequent seizure occurred. On May 24, 1993, following a suppression hearing, the Honorable Albert John Snite, Jr. granted Albino's motion to suppress. This appeal followed.

On appeal, the Commonwealth presents the following issue for our review:

> Did the police lack probable cause to arrest, where Officer Meissler observed Albino engage in a surreptitious sale of "small" objects in an area where Officer Meissler had conducted numerous arrests for narcotics offenses?

In reviewing an order granting a motion to suppress evidence, we must determine whether the factual findings of the suppression court are supported by evidence of record. Commonwealth v. Frank, 407 Pa. Super. 500, 502, 595 A.2d

1258, 1259 (1991). In making this determination, we may consider only the evidence of the defendant's witnesses and so much the Commonwealth's witnesses as fairly read in the context of the record remains uncontradicted. Commonwealth v. Dennis, 417 Pa. Super. 425, 427, 612 A.2d 1014, 1015 (1992). If the evidence supports the factual findings of the trial court, we are bound by such findings, and we may reverse only if the legal conclusions drawn therefrom are erroneous. Id.

The suppression court made the following factual findings: On September 8, 1992, Officer Gregory Meissler conducted routine surveillance of the corner of Mutter and Cambria Streets in Philadelphia, using a pair of binoculars. At approximately 12:55 p.m., Officer Meissler observed an unidentified Black female approach Albino, who

was standing in front of a building on the 2900 block of Mutter Street. As the woman reached Albino's position, Officer Meissler witnessed Albino reach beneath the waistband of his pants, pull out a purse, remove some "objects"[1] from the purse, and hand those objects to the unknown female in exchange for United States currency. In Officer Meissler's expert opinion as a trained police officer,[2] the transaction he witnessed involved the sale of controlled

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[1]During the suppression hearing there was some controversy as to Officer Meissler's characterization of these objects. On direct examination he described the objects removed from the purse as being "white," but on cross-examination he testified that he could not tell exactly what these objects were from his vantage point.

[2]Officer Meissler is an experienced police officer who, in his five years on the police force, has made more than 40 arrests for crimes involving controlled substances and has, on more than 100 occasions, observed the sale of controlled substances on the very corner on which he observed Albino's transaction.

substances. Pursuant to this belief, Officer Meissler approached Albino and, after patting him down for weapons, asked him to open his trousers and remove the purse he had hidden there. Upon complying with this request, Officer Meissler examined the contents of the purse and discovered 18 yellow capped vials of crack cocaine and $13.00 in cash. Officer Meissler immediately placed Albino under formal arrest.

In the case at hand, the Commonwealth argues that the trial court erred in suppressing the 18 vials of crack cocaine seized from Albino's person by Officer Meissler. Specifically, the Commonwealth asserts that Officer Meissler conducted a valid search incident to a lawful arrest, based upon probable cause that Albino committed an illicit sale of narcotics. We agree.

In general, a search conducted without a warrant is presumed unreasonable unless it is undertaken under a recognized exception to the warrant requirement. Commonwealth v. Agnew, 411 Pa. Super. 63, 74, 600 A.2d 1265, 1271 (1991). A search incident to a lawful arrest is one such exception. Id. To be lawful, a warrantless arrest must be supported by probable cause. The standard for determining whether probable cause exists is the "totality of the circumstances" test announced in Illinois v. Gates, 462 U.S. 213 (1982). Commonwealth v. Guzman, 417 Pa. Super. 364, 367, 612 A.2d 524, 525 (1992). Probable cause to arrest exists when the facts and circumstances contemporaneous with the arrest would warrant a reasonable person to believe that a crime had been committed and that the suspect had

committed it. Id. (citations omitted).

Moreover,

> [w]hen we examine a particular situation to determine if probable cause exists, we consider all the factors and their total effect, and do not concentrate on each individual element.... **We also focus on the circumstances as seen through the eyes of the trained officer, and do not view the situation as an average citizen might....** Finally, we must remember that in dealing with questions of probable cause, we are not dealing with certainties. We are dealing with the factual and practical considerations of everyday life on which reasonable and prudent men act. This is not the same 'beyond a reasonable doubt' standard which we apply in determining guilt or innocence at trial. Commonwealth v. Devlin, 221 Pa. Super. 175, 289 A.2d 237 (1972).

Guzman, 417 Pa. Super. at 367-68, 612 A.2d at 525 (emphasis added). See also Agnew, supra; Commonwealth v. Ellis, 354 Pa. Super. 11, 510 A.2d 1253 (1986); Commonwealth v. Simmons, 295 Pa. Super. 72, 440 A.2d 1228 (1982).

Furthermore, when a police officer observes citizens engaged in suspicious

transactions on public thoroughfares, the determination of whether probable cause exists is ordinarily a difficult one. Agnew, 411 Pa. Super. at 76, 600 A.2d at 1272. In fact, the Pennsylvania Supreme Court has observed that in such cases "all the circumstances surrounding a transaction between citizens are to be considered in determining whether law enforcement officers have acted arbitrarily or have acted on the basis of probable cause." Id. (citing Commonwealth v. Lawson, 454 Pa. 23, 27, 309 A.2d 391, 394 (1973)). In making such a determination, the Lawson Court elaborated that:

> All of the detailed facts and circumstances must be considered. The time is important; the street location is important; the use of a street for commercial transactions is important; the number of such transactions is important; the place where the items were kept by one of the sellers is important; the movement and

> manners of the parties are important.
>
> * * * *
>
> It is difficult to isolate any one fact or circumstance and assign to it a given weight. If any one of the facts and circumstances, which we have detailed, were missing, the necessary conclusion of probable cause might not be allowable. Every commercial transaction between citizens on a street corner when unidentified property is involved does not give rise to probable cause for an arrest.

Id. (citing Lawson, 454 Pa. at 28-29, 309 A.2d at 394).

Recently, in Commonwealth v. Malson, 434 Pa. Super. 155, 642 A.2d 520 (1994), we had pause to consider whether a police officer had probable cause to arrest an individual, after observing what appeared to be a drug transaction. The facts in Malson were as follows: On September 14, 1991, at approximately 9:15 p.m., Philadelphia Police Officer Michael Copecki conducted surveillance without binoculars in the area of

Hieskil and Armat streets. After a few minutes, Officer Copecki saw the defendant David Malson standing outside of a sports bar located on that corner. Several people walked past Malson with no conversation or interaction. A short time later, a black male approached Malson and handed him "something green."[3] In exchange, Malson removed a small purse from his pants pocket, withdrew an unknown object from the purse, and handed it to the male. The male then exited in a black automobile.

Officer Copecki continued to observe Malson for a brief time, but witnessed no additional suspicious conduct. Officer Copecki was then joined

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[3]On direct examination at the suppression hearing, Officer Copecki testified that the green object appeared to be U.S. currency. On cross-examination, however, Officer Copecki admitted that the green object could have been something besides money.

by his partner, Officer Peters, and the two officers placed Malson under arrest. Following the arrest, the police seized a brown change purse containing $41.00 and 18 yellow-tinted vials containing crack cocaine. Officer Copecki, a seven-year veteran on the police force, who had made ten prior narcotics arrests, believed that Malson had sold narcotics to the unknown male. Prior to trial, Malson filed a motion to suppress the seized vials of crack cocaine, claiming that the police lacked the probable cause necessary to arrest him. The suppression court agreed and granted Malson's motion.

On appeal, we affirmed the suppression court's order, agreeing that Officer Copecki lacked the necessary quantum of probable cause required to arrest Malson. In reaching this decision, we stated that in order for probable cause

to exist, "there must be other facts which, together with a suspicious exchange of unidentified objects, supports a reasonable belief that the exchange is drug related." Malson, 434 Pa. Super. at 164, 642 A.2d at 524.

In that case, however, we could find no such "other factors." Officer Copecki witnessed the transaction without the benefit of binoculars and could not positively identify either the currency or the crack cocaine. In addition, the incident occurred at night, Malson withdrew the brown purse from his right pants pocket and not from some more furtive location, and Malson did not attempt to flee when approached by the police. Thus, we concluded that as Malson's arrest was not supported with probable cause, the subsequent search was improper, and the crack cocaine

seized was correctly suppressed by the trial court.

In the instant case, however, we think that there were "other facts" which, combined with the exchange of objects, gave rise to a reasonable belief that the exchange was drug related. Unlike Malson, in the present case, Officer Meissler observed the entire scene through binoculars and was able to positively identify currency changing hands during the transaction. The incident occurred during the day, on the 2900 block of North Mutter Street, where Officer Meissler testified he had made approximately forty previous narcotics arrests. Further, in his five years of experience in that particular district, Officer Meissler had observed more than 100 sales of controlled substances. We believe, therefore, that viewing this scene through the eyes of

an experienced police officer, there existed sufficient probable cause to arrest Albino, despite Officer Meissler's inability to positively identify the object exchanged as a controlled substance. Accordingly, we conclude that the trial court erred in granting Albino's motion to suppress and in precluding the seized crack cocaine into evidence.

Order reversed.

HOFFMAN, J., files a Dissenting Opinion.

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RUDOLPH ALBINO	:	NO. 02068 PHL 93

Appeal from the Order entered May 24, 1993 in the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 9209-2630.

BEFORE: CIRILLO, BECK and HOFFMAN, JJ.

FILED: Jan. 5, 1995

DISSENTING OPINION BY HOFFMAN, J.:

"Every commercial transaction between citizens on a street corner does not give rise to probable cause for an arrest." Commonwealth v. Maleson, 434 Pa. Super. 155, 161, 642 A.2d 520, 529 (1994) (quoting Commonwealth v. Lawson, 454 Pa. 23, 28-29, 309 A.2d 391, 394 (1973)). In the instant case, Officer Meissler observed appellant engage in one transaction with another individual. While he observed the exchange of U.S. currency, he admits that he was unable

to identify the object exchanged.[1] Officer Meissler had no information that appellant was a known drug dealer, nor was he responding to any citizen complaints of drug activity at that location on September 8, 1992. Moreover, when approached by Officer Meissler, appellant made no attempt to flee and behaved in a compliant manner. Viewing all of the facts and circumstances in their totality, I find that there was not a reasonable basis to support a finding of probable cause to arrest. See Commonwealth v. Greber, 478 Pa. 63, 385 A.2d 1313 (1978) (probable cause to arrest lacking where the officer had no prior information about drug activity, only observed one isolated transaction

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[1]On cross examination Officer Meissler testified that on the day in question he could not identify the objects exchanged from his vantage point. N.T., May 24, 1993 at 14-17.

and could not identify either object exchanged); Commonwealth v. Maleson, at 164, 642 A.2d at 525 ("no citizen may be arrested merely for passing an unidentified item to another citizen on a public street"); Commonwealth v. Agnew, 411 Pa.Super. 63, 74, 600 A.2d 1265 (1991) (no probable cause to arrest where officers unable to identify object exchanged). Accordingly, for the reasons stated above, I must respectfully dissent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	SEPTEMBER TERM, 1992
vs.	:	
RUDOLPH ALBINO	:	NO. 2630

O P I N I O N

By: Albert John Snite, Jr., J.

PROCEDURAL HISTORY

On September 8, 1992, the Defendant was arrested and charged with both possession and possession with the intent to deliver crack cocaine, a controlled substance.[1]

On November 11, 1992, the Defendant filed an Omnibus Motion (Motion to Suppress), alleging illegal police conduct. The Defendant asserted that the police arrested him without a warrant and without probable cause, therefore, making

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[1] 35 PS 780-113(a)(16)&(30).

their subsequent seizure of a brown change purse, found on the Defendant, illegal.

On May 24, 1993, this Court held an evidentiary hearing and granted Defendant's Motion to Suppress. The Commonwealth perfected a timely appeal in this matter on June 24, 1993.

FACTUAL HISTORY

On Tuesday, September 8, 1992, at approximately 12:55 p.m. Police Officer Gregory Meissler of the Philadelphia Police Force was conducting surveillance of the corner of Mutter and Cambria Streets. (N.T. 8). Officer Meissler was positioned in the 2800 block of Mutter Street when he observed the Defendant standing in front of 2900 North Mutter Street. (N.T. 8). Officer Meissler saw an unidentified black female approach the Defendant. The woman handed United States currency to

the Defendant and he removed a brown purse from the waist of his pants and handed the woman objects[2] from the purse.

After witnessing the transaction between the defendant and the black female, Officer Meissler returned to his car, drove around the block and saw the defendant across the street now sitting on the steps of 2901 Mutter Street. (N.T. 12). The Officer then exited his vehicle and asked the Defendant to approach him. When the Defendant approached him, Officer Meissler placed the defendants hands on the hood of the patrol car, patted him down, turned him

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[2]Officer Meissler testified at the May 24, 1993 hearing that the Defendant handed the black female "white object". (N.T. 9). However, on cross examination he conceded that at the Preliminary Hearing on September 16, 1992 he only testified to seeing the defendant hand the woman "objects" and could not identify what those objects were from his vantage point. (N.T. 14-17).

around and pulled open the front of his pants to look inside. A brown change purse was spotted inside the Defendants pants and he was instructed to remove the purse and give it to the Officer. Officer Meissler then opened the purse which contained eighteen, yellow capped, clear plastic vials of crack cocaine. (N.T. 12). The Defendant was then formally placed under arrest and thirteen dollars in United States currency was seized from his possession. (N.T. 13).

ISSUES ON APPEAL

In granting the Defendant's Motion to Suppress, the Court found that the police acted without probable cause in arresting the Defendant and seizing the brown change purse. The Commonwealth challenges this decision.

Probable cause is needed to justify the warrantless arrest of an individual.

Probable cause exists where the facts and circumstances known to the officer at the time of the arrest would warrant a reasonably prudent person to conclude that a crime has been committed and that the arrestee is the perpetrator. Commonwealth v. Travaglia, 502 Pa. 74, 467 A.2d 288 (1983); see also, Commonwealth v. Harper, 485 Pa. 572, 403 A.2d 536 (1979).

At the Motion to Suppress hearing in the case **sub judice**, the Commonwealth relied upon Commonwealth v. Dennis, 417 Pa. Super. 425, 612 A.2d 1014 (1992) to justify the officer's actions. (N.T. 21-25). The Commonwealth contended that, similar to the officers in Dennis, Officer Meissler acted with probable cause in arresting the Defendant for selling controlled substances.

In Dennis, the police received numerous citizen complaints that drugs

were being sold from a specific house on their street. Two officers were dispatched to the area. The officers saw the defendant and another man standing in front of the doorway of the suspected drug house. The man handed the defendant U.S. currency, and in return the defendant handed the man an unidentified object. 612 A.2d at 1015. Upon the approach of the officers, both men ran into the house. During the defendant's flight through the house, he discarded a clear plastic bag containing a white chunky substance, later identified as crack cocaine, through a window. The bag was subsequently recovered by the police. Id.

In Dennis,[3] the Superior Court

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[3]Dennis contains the following language, "Probable cause exists when criminality is one reasonable inference; it need not be the only, or even the most likely, inference." 612 A.2d 1014, (continued...)

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[3](...continued)
1017. This language was cited to me by the Commonwealth. (N.T. 21-25). Another recent expression of this standard is contained in Commonwealth v. Burnside, 625 A.2d 678, 681 (Pa.Super. 1993): "It is only the probability, and not a **prima facie** showing of criminal activity that is the standard of probable cause for a warrantless arrest. Probable cause exists when criminality is one reasonable inference..."

The "not a **prima facie** showing" language originates in Commonwealth v. Marino, 435 Pa. 245, 253, 255 A.2d 911 (1969). Marino stated that probable cause is more than suspicion and conjecture, but less than proof required for conviction. It then stated, "It is only the probability, and not a prima facie showing, of criminal activity that is the standard of probable cause." Id. Marino cites Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d. 142 (1964), for this statement.

Beck does not specifically state this, nor is any analysis made of what **"prima facie"** exactly is. Beck held that probable cause is not met by showing that someone, about whom it is anonymously reported that he has something to do with some type of criminal activity, happens to have a criminal record for similar activity. Nonetheless, I have no quarrel with stating that probable cause is not a **prima facie** showing. For, many times, probable cause could exist even if no crime, in

(continued...)

[3](...continued)
fact, exists. There need not be **prima facie** evidence of a crime for probable cause to exist.

The "reasonable inference" language has as its genesis the case of Commonwealth v. Kendrick, 340 Pa.Super. 563, 490 A.2d 923, 927 (1985). Kendrick cites Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), for the proposition that probable cause "does not demand any showing that such a belief [of the existence of probable cause] be correct or more likely true than false." Id. Consequently, there now exist many Superior Court cases that imply that so long as the facts available to the officer could sustain an inference of criminal activity, even though the inference of innocent activity is the more logical inference, probable cause to arrest exists.

As our search and seizure law also recognizes the concept of "reasonable suspicion", this new test of "reasonable inference" for establishing probable cause is truly problematic. "Reasonable suspicion" is defined as articulable facts that are consistent with criminal activity, even though an innocent explanation could be more likely or as likely as the criminal explanation. It seems to me that a reasonably prudent person does not come to a "belief" unless he or she believes something to be more likely true than false.

(continued...)

[3](...continued)
Not only is the Brown standard problematic, it is wrong. The precise quote, with all citations, is:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief", Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925) that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, non-technical" probability that incriminating evidence is involved is all that is required. Brinegar v. United States, 388 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed.2d 1879 (1949). Moreover, our observation in United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), regarding "particularized suspicion", is equally applicable to the probable-cause requirement:
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> > "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated

(continued...)

[3](...continued)
certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

460 U.S. 739, 742, 103 S.Ct. 1535, 1543.

Starting with the second sentence of this passage, one might assume that Carroll stands for the proposition that probable cause is satisfied if the facts available would warrant a man of reasonable caution in the belief that criminality may be present. The precise language in Carroll is, that the facts available would "warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped..." (Emphasis added.) The belief required by Carroll, and by the Supreme Court of Pennsylvania, is the belief that criminal activity is occurring, not that criminal activity may be occurring.

The next sentence quotes Brinegar as stating that what is required is a practical, non-technical probability that incriminating evidence is involved.
(continued...)

[3](...continued)
Brinegar, however, also states that there must be a "reasonable belief that an offense has been or is being committed." The belief is that criminality has, or is, occurring; not that criminality might have been, or might be, occurring.

The next passage of the quote, at least, does admit that the "observations" it refers to is in the context of a court decision defining reasonable suspicion. (Cortez). It is again, extremely problematic for a trial court, in defining probable cause, to "equally apply" the concept of reasonable suspicion.

The Supreme Court of the United States had extracted the word "probable" out of the phrase "probable cause", and attached to it a modern day definition more consistent with a study of statistics; i.e., "probabilities" can be said to address the full range of possibilities, from zero to one hundred percent. The word "probable" in "probable cause", I submit, has been understood, at least until Brown, to be a belief that criminality is, at a minimum, as likely as a conclusion as innocent activity. I believe the Supreme Court of the United States was certainly operating under this assumption in Terry v. Ohio, when it decided that articulable facts, suspicious of criminal activity but less than probable criminal activity, could allow a police officer to take certain actions.

(continued...)

reversed the trial court's suppression order and held that probable cause existed to justify the defendant's arrest. 612 A.2d at 1015-1016. The Court concluded that because the police had numerous citizen reports about drug activity at the house, had corroboration of these reports from the observations of the officers, and had the added element of the defendant's flight, there

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[3](...continued)

In the final analysis, I believe that my decision herein is correct under either standard. However, I believe the Superior Court's standard has never been adopted by our Supreme Court, and is at odds with that Court's standard.

The Pennsylvania Supreme Court has never adopted a definition of probable cause wherein the level of certainty of the officer's belief could be as minimal as the least likely of a number of reasonably possible conclusions. Probable cause requires the officer to <u>believe</u> that criminal activity is occurring. Reasonable suspicion only requires that criminality is a <u>reasonable possibility</u>, even in the face of other possibilities of non-criminal behavior.

existed a reasonable belief that criminal activity was occurring and, thus, probable cause for the arrest. 612 A.2d at 1016. The Court noted that the most compelling factor in support of its decision was that the residents of the area had made multiple reports to the police of drug activity at that specific house.

The facts in the case sub judice are distinguishable from the facts in Dennis. Most notably, Officer Meissler was not responding to any citizen complaints of drug activity at that location on September 8, 1992. Nor was there any information that Defendant was a known drug dealer. Furthermore, unlike in Dennis, the Defendant did not flee at the sight of the officer. In fact, he willingly came when called by the Officer. (N.T. 12, 17).

In Commonwealth v. Greber, 478 Pa. 63, 385 A.2d 1313 (1978), the Superior Court held that there was no probable cause to arrest the defendants where the officer had no prior information about drug activity, where the officer observed only one isolated transaction between the defendants and another youth, and where the officer could not positively identify either of the objects exchanged.[4] The Superior Court noted that probable cause does not arise from the observation of every commercial transaction between citizens on the

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[4] In Greber, the defendants were observed meeting a youth in the parking lot of a bowling alley. From the defendants' car, someone, it was unclear exactly whom, was seen handing a bag to the youth. The youth held the bag up to his face, appearing to smell it. He pulled something out of his pocket. The observing officer thought it was money, but he was not certain. 385 A.2d at 1315.

street when unidentified property is involved. 385 A.2d at 1315.

Additionally, in Commonwealth v. Hunt, 280 Pa. Super. 205, 421 A.2d 684 (1980), the Superior Court held that probable cause was lacking where the officer observed the defendant and another male make an exchange of unidentifiable objects. 421 A.2d at 686. The Superior Court determined that the observed transfer could not lead to the conclusion that a drug transaction was taking place even though the officer had an anonymous tip that drug sales were going on in an area where the officer had made prior arrests for such sales,[5] and even though the defendant fled when

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[5]Officer Meissler testified that he was aware of about forty arrests in the 2900 block of North Mutter Street in the past five years, about one arrest every month and a half. (N.T. 6-8). There was no indication as to when the last arrest had been made.

the officer approached. 421 A.2d at 686-687, citing Commonwealth v. Santiago, 220 Pa. Super. 111, 283 A.2d 709 (1971).

Applying Greber and Hunt to the instant case, it follows that the circumstances observed by Officer Meissler - the Defendant standing in front of 2900 North Mutter Street, engaging in one transaction with an unidentified woman, who handed the defendant U.S. currency but the objects which the woman received being unidentifiable - could not warrant a reasonably prudent person to conclude that the Defendant was engaged in the sale of illegal drugs. The officer did not have information that a sale was going to occur at 2900 North Mutter Street on September 8, 1992, or that the Defendant conducted illegal drug sales on any prior occasions. Furthermore, the

Defendant made no attempt to flee when Officer Meissler approached, in fact, he willingly came forward when the Officer called him and readily complied with the Officer's requests (N.T 12, 17). Under the totality of circumstances, it could not reasonably be concluded that the Defendant was selling illegal drugs. Accordingly, Officer Meissler did not have probable cause to arrest the Defendant.

Not every commercial transaction between citizens on a street corner gives rise to probable cause for arrest when unidentified property is involved. Commonwealth v. Lawson, 454 Pa. 23, 309 A.2d 391 (1973). In Lawson,[6] the

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[6] "The officers observed three separate exchanges of small items for money on a street at about 11:50 p.m. The wife seller kept the items in her bosom between transactions. The husband seller who received the money from the buyers did not keep the items on his

(continued...)

Supreme Court held that probable cause was established where all the facts and circumstances considered in their totality would lead the officers as prudent men to believe that some type of contraband was being sold. The Court went on to state,[7] "It is difficult to isolate

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[6](...continued)
person. Only after receiving money from the buyer did the husband walk over to his wife who would remove the items from a place of concealment in her bosom for transfer to her husband. She would then return the items to their place of concealment. Only the husband seller would transact the business at hand with the buyer, while the wife seller remained several feet away. Each buyer would immediately depart after the completion of the transaction. When appellants saw the unmarked car suddenly pull up alongside them, they quickly headed into the bar. As the officers followed them, the wife headed toward the ladies room while the husband blocked the entrance to the bar".

[7]"All of the detailed facts and circumstances must be considered. The time is important; the street location is important; the use of a street for commercial transactions is important; the number of such transactions is important; the place where the small
(continued...)

any one fact or circumstance and assign to it a given weight. If any one of the facts or circumstances, which we have detailed, were missing, the necessary conclusion of probable cause might not be allowable". In the instant matter several of the facts and circumstances which allowed a finding of probable cause in Lawson are missing; there was a single transaction, it occurred openly in broad daylight, the Defendant made no attempt to flee or otherwise leave the area; and the defendant behaved in a compliant manner. This case when viewed in light of Greber, Hunt, and Lawson does not allow for a finding of probable cause.

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[7](...continued)
items were kept by one of the sellers is important; the movements and manners of the parties are important".

CONCLUSION

Having found that Officer Meissler acted without probable cause in seizing the brown change purse, the Defendant's Motion to Suppress was properly granted.

BY THE COURT:

/s/
ALBERT JOHN SNITE, JR.

DATED: September 2, 1993

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	COURT OF COMMON PLEAS
VS.	:	SEPTEMBER TERM, 1992
RUDOLPH ALBINO	:	BILL 2630

MAY 24, 1993

COURTROOM 475, CITY HALL,
PHILADELPHIA, PENNSYLVANIA

"MOTION TO SUPRESS PHYSICAL EVIDENCE"

BEFORE: THE HONORABLE ALBERT J. SNITE, JR., J., PRESIDING

APPEARANCES:

PAUL GRAEFF, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
FOR THE COMMONWEALTH

MAUREEN McCARTNEY, ESQUIRE
DEFENDER ASSOCIATION OF
PHILADELPHIA
FOR THE DEFENDANT

COMMONWEALTH'S EVIDENCE

	D	C
PO GREGORY MEISSLER	[App. 43]	[App. 56]

(May 24, 1993)

THE COURT: Commonwealth versus Rudolph Albino, this is a motion to suppress, is that correct?

MS. MCCARTNEY: That is correct, Your Honor.

THE COURT: What is it that you're seeking to suppress?

MS. MCCARTNEY: Your Honor, I'm seeking to suppress the physical evidence in this case. Specifically, eighteen vials and thirteen dollars in United States currency.

The basis being both under the United States and State constitutions, that there was no reasonable suspicion nor probable cause prior to the seizure of those items.

THE COURT: The date, time, and place?

MS. MCCARTNEY: September 8, 1992. The time is 12:55 p.m., the 2900 block of North Mutter Street.

THE COURT: Commonwealth have sufficient facts to proceed?

MR. GRAEFF: Yes, judge.

Officer Meissler is my first and only witness.

THE COURT: Then there is no need for sequestration.

Officer, you may take the stand.

COMMONWEALTH'S EVIDENCE

THE COURT: Any defense witnesses?

MS. MCCARTNEY: No, Your Honor.

Police Officer Gregory Meissler, Badge Number 9327, 25th District, Philadelphia Police Department, having been first duly sworn testifies as follows:

MR. GRAEFF: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. GRAEFF:

Q. Officer, I'm going to direct your attention back to August 8, 1992, on that date were you on duty as a Philadelphia police officer?

A. September 8, 1992, I believe it was.

THE COURT: The record should reflect that -- why don't we have the interpreter identify herself?

MS. GARAYUA: My name is Iris Garayua, Official Court Translater [sic], Court of Common Pleas, Spanish language.

THE COURT: Swear her in.

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Iris Garayua, Official Court Interpreter, Court of Common Pleas, Spanish language, was sworn to faithfully translate from the English language into the Spanish language, and

from the Spanish language into the English language, on behalf of the defendant.

****

THE COURT: Now, on September 8, 1992.

BY MR. GRAEFF:

Q. On September 8, 1992, you were on duty as a Philadelphia police officer?

A. Yes, I was.

Q. And you were assigned to what district?

A. The 25th district.

Q. Up to that day on September 8th, how long had you been assigned to the 25th district?

A. About five years.

Q. Could you tell the Court whether you came in contact with anyone you see in this courtroom on that day?

A. This defendant, with the white shirt, sitting at defense counsel's table.

THE COURT: Indicating, the defendant at the bar of the court.

BY MR. GRAEFF:

Q. Were you in uniform on that day?

A. In uniform, in a marked radio patrol car.

Q. Alone or with a partner?

A. By myself.

Q. Now, where was it that you first observed the defendant?

A. I first observed him standing directly in front of 2900 North Mutter Street.

Q. And that location is in the 25th District?

A. Yes.

Q. What part of the city is that?

A. West Kensington.

Q. And is that specifically a part of your sector during that time?

A. Yes.

Q. And during the course of your duties in the five years in the 25th District, and while you were patrolling that sector at any time did you have occasion to make any arrests in that location?

A. Yes, there were arrests.

Q. How many would you say?

A. Numerous.

Q. Numerous?

A. Yes.

Q. Give us an indication?

A. In the 2900 block of North Mutter Street, I estimate at least forty narcotics arrests I have made.

Q. As a result of those forty narcotics arrests, and, incidentally, did those forty span over the entire five years preceding this incident?

A. Yes, I'd say over the five years; yes.

Q. Did you have an occasion to testify in court as a result of those arrests?

A. Yes, I have.

Q. And of the forty, you say approximately these are drug cases?

A. That's correct.

Q. Did you combine with any other officer, or any other teams of officers, to make any drug-related arrests in addition to those forty in that area?

A. Yes.

Q. How many would you say that you're aware of, that you were a part of?

A. All drug arrests made?

Q. In this location?

A. Just --

Q. -- over five years in that location?

A. About forty which were by myself or with other officers, forty.

Q. Could you tell Judge Snite what happened leading up to your contact with the defendant, where you were and what time it was, and what happened?

A. If Your Honor please, on that date at approximately 12:55 p.m. I was outside, behind my vehicle, on foot, and I was using field glasses.

I was watching the corner of Mutter and Cambria Streets, which is the 2900 block of North Mutter Street.

THE COURT: I'm sorry, Cambria?

THE WITNESS: Yes, and Mutter.

BY MR. GRAEFF:

Q. And what were you there for?

Why were you out of your car and why were you doing a surveillance?

A. I was looking for drug activity.

Q. What happened?

A. I was down -- I was in the 2800 block of North Mutter Street, closer to Somerset Street, behind a parked car,

and I was using field glasses, binoculars. I was looking down the street.

Now, in just after a couple of moments I saw the defendant. He was standing right in front of 2900, which would be the exact address, there, 2900 North Mutter Street.

He was approached by a black female who came from -- she was walking westbound on Cambria, went across Mutter Street, approached the defendant and she handed the defendant United States currency.

At this time the defendant reached into his waist, into his pants.

Q. Indicating, the front of his pants with his left arm. Go ahead.

A. I saw him take out a brown purse. He went into the purse and took out white objects, which he handed to the black female.

At that time, the black female turned and walked eastbound on Cambria Street.

Q. She walked in the opposite direction from where she came?

A. She walked from where she came from and she walked back.

Q. Oh, she walked back from where she came?

A. Yes.

Q. What made these observations of the defendant -- how far away from him were you?

A. Almost a block away.

Q. And were you using field glasses the whole time?

A. Yes, I was.

Q. Was there anything during the course of your surveillance of this woman and the defendant that would have obstructed your view of them, and, if so, what?

A. There was nothing, no.

Q. This is 12:55 in the afternoon?

A. That's correct.

Q. Was it a nice day?

A. As I recall it was no rain, but I don't recall if it was bright and sunny though.

Q. Other people in the area?

A. Yes.

Q. And the woman that you saw, would she be coming from your left or from your right?

A. My right.

THE COURT: I'm sorry?

THE WITNESS: From my right, across to my left, and then walking back.

THE COURT: You were viewing northbound?

THE WITNESS: I was looking northbound, yes.

BY MR. GRAEFF:

Q. And during the course of your observations of the defendant and this woman, did you ever lose sight of the defendant during their contact with each other?

A. No.

Q. And when the woman -- up until the point the woman left the neighborhood, did you ever lost sight of her?

A. Until she walked out of my sight walking on Cambria Street, then I lost sight of her.

Q. You said you observed "white objects" at the time you first made your surveillance, even with your field binoculars did you know what those "white objects" were at that time?

A. For a fact, no.

Q. The type of transactions you observed during the course of your five years as a police officer, how many

times would you have occasion to see that type of exchange?

A. Hundreds.

Q. And based on the hundreds of times you have seen that exchange, what did you believe had occurred?

A. I believed a narcotics transaction was taking place.

Q. Did you have any idea what you thought, based on your experience, was in the defendant's hand or what was given to the woman?

A. Vials of crack.

Q. But you did not know for sure at that time?

A. Not positive, no.

Q. Did you know for sure they were white vials?

A. I knew they were white objects.

Q. Now, after the woman left the area, what happened?

A. I went back to my car which was parked on Somerset Street, and I drove around the block and I observed the defendant. He was right across the street from 2900, actually sitting on the steps of 2901 Mutter Street.

I then exited my vehicle and I asked the defendant to approach me, which he did.

I put his hands of the hood of the car, patted him down for my protection, turned him around, and pulled open his front pants a little bit to look down. I saw a brown change purse inside.

I instructed the defendant himself to reach down and get the purse, which he did, and he handed it to me.

I opened it up and I found it contained eighteen, clear plastic vials, all containing an off-white chunky substance, sealed with yellow caps.

At this time the defendant was placed under arrest. I took from his person thirteen dollars in United States currency which was placed on property receipt 393066, consisting of one, ten-dollar bill and three, one dollar bills.

The defendant was transported to the Narcotics Unit where the vials were field-tested by the investigator, and her name is Willis, badge 1390.

After they were field-tested, I took them to the chemical lab after they were placed on property receipt number 394203.

Q. Were you working alone, officer?

A. Yes, I was.

Q. Was there any backup as part of your surveillance team or were you by yourself that day?

A. I was by myself.

MR. GRAEFF: I have no more questions, Your Honor.

THE COURT: Cross-examine.

CROSS EXAMINATION

BY MS. MCCARTNEY:

Q. Officer, you were making your observations from approximately one block away?

A. Yes, ma'am.

Q. You say that you were behind a car when you were making these observations, is that correct?

A. That's correct, ma'am.

Q. You were not able to see what it was that was passed between the defendant and this woman, is that correct?

A. All I could tell is that they were small white objects.

Q. You testified today you were able to see that they were white objects?

A. That's all I could see at the time, ma'am.

Q. You recall testifying at the preliminary hearing, sir?

A. Yes, ma'am.

Q. And you recall the district attorney asking you what had transpired on that day?

A. Yes.

Q. There you never testified you saw white objects, is that correct?

MR. GRAEFF: Objection, judge. I ask for the page, if there is a reference. If there is not a reference to a page, I ask there be one or the question is objectionable.

THE COURT: Do you have a specific reference in mind where he was asked such a question?

MS. MCCARTNEY: Actually, there are two specific references.

THE COURT: Then let's locate them.

MS. MCCARTNEY: I'm referring to page four, halfway down approximately.

THE COURT: Can we have the date and location of the preliminary hearing?

MS. MCCARTNEY: The preliminary hearing was held on September 16, 1992, at Front and Westmoreland Streets, in front of the Honorable Harvey Robbins.

THE COURT: Does that sound right to you?

MR. GRAEFF: Yes. I was looking for the page, that's all.

BY MS. MCCARTNEY:

Q. You recall testifying at that preliminary hearing?

A. Yes.

Q. That would only have been eight days after the incident happened, is that correct?

A. That is correct.

Q. Now, I'm referring to halfway down page four, in response to the District Attorney's question:

"Officer, what did you receive?"

Part of your response was, if I may, judge, just go to that part of the response:

"He reached in the change purse and took out objects which he handed to a black female."

Do you remember that?

A. Yes.

Q. You did not mention "white," did you, "white objects?"

A. No, I did not.

Q. Also referring to that same preliminary hearing, I'm referring to page 7 now.

This question was asked by the defense attorney:

"Could you make out" --

THE COURT: -- what page?

MS. MCCARTNEY: Page 7, approximately halfway down the page.

THE COURT: Thank you.

BY MS. MCCARTNEY:

Q. "Could you make out what the objects were that the person took out of the pants?

"Answer. Not really. All I could see he was dropping objects in her hand. I couldn't tell exactly what they were."

You recall giving that answer at the preliminary hearing?

A. Yes.

Q. Again, you did not mention that you had seen "white objects," is that correct?

A. No, I did not.

Q. All right.

Now, after you made that observation you immediately went to your vehicle and entered the 2900 block of North Mutter, is that correct?

A. Yes, I had to go around the block almost.

Q. And you called the defendant over to your vehicle?

A. Yes.

Q. You got out, put him on the car, is that correct?

A. Yes. Getting out he was on my right, so I had to go around the car. And as I'm going around, I'm motioning him to come here, which he did.

Q. You put him up against the car and patted him down?

A. Yes.

Q. You pulled back his pants a little bit so you could look down them?

A. Yes, after I patted him down --

THE COURT: -- for weapons?

THE WITNESS: Yes.

THE COURT: Then you went to the area --

THE WITNESS: -- and I held his pants out.

BY MS. MCCARTNEY:

Q. You testified today that you asked him to remove the objects from his pants, is that correct?

A. Yes, I did not want to put my hands down there.

Q. That was in response to your command to do so, is that correct?

A. Yes.

MS. MCCARTNEY: I have nothing further.

THE COURT: Anything else?

MR. GRAEFF: No more questions, Your Honor.

THE COURT: All right.

MR. GRAEFF: Commonwealth rests on the motion.

THE COURT: You may step down, officer Meissler.

MS. MCCARTNEY: The defense would rest on the motion.

THE COURT: All right.

MS. MCCARTNEY: The question for the Court is whether there was probable cause at the point in time when the seizure was made of the defendant. I would submit to the Court that there was not.

What you have here is one, single exchange between citizens on the street where the police officer was not able to see what it was that was being passed between the individuals. I would submit that's not sufficient to create probable cause. And, clearly, in this case we have the seizure of the person.

The police officer testified that he put Mr. Albino on a car, patted him down, pulled out his pants. Clearly, that's a seizure, Your Honor.

Before someone can be seized you need to have probable cause.

I would submit that the commonwealth has not met its burden of

presenting probable cause prior to the seizure.

Judge, I have some case law which I would like to submit to the Court, beginning with Commonwealth versus Vassiljev, a 1971 case.

THE COURT: Spell that case for me?

MS. MCCARTNEY: V-A-S-S-I-L-J-E-V.

That stands for the proposition that police officers who saw something being passed between the defendant and another person did not have probable cause to arrest defendant without knowing what was being passed. Thus, narcotics found on defendant in station house were product of unconstitutional search and not admissible in prosecution.

Commonwealth versus Brever, which stands substantially for the same proposition, an isolated event of defendant. After police observed him

conducting what they thought to be an exchange, it did not in and of itself create probable cause.

Commonwealth versus Agnew.

Commonwealth versus Briggs, which is a factual situation that is somewhat different than what we have in this particular case.

The police officers had an anonymous tip which told them that narcotics were going to be exchanged, were being sold out of two parked cars on the street.

The police officers went to that location, saw the two parked cars, saw an exchange between one of the defendants who was in that car that they had the tip on before, and passed something to another person.

The Court held that probable cause was not created based upon the officers'

observations or based on the anonymous tip which the police officers had.

I think in this case there clearly was not probable cause, and I'm asking you to suppress the evidence because it was seized as a result of an illegal arrest.

THE COURT: Mr. Graeff.

MR. GRAEFF: Judge, the Superior Court, in Commonwealth versus Dennis, ruled on this exact factual scenario.

In that case --

THE COURT: -- Do you have Dennis?

MR. GRAEFF: Yes, I do. I want to refer to it.

THE COURT: Can I see it?

MR. GRAEFF: I want to point something out to the Court. I just have one copy.

THE COURT: All right.

MR. GRAEFF: I'll refer to something and then I'll give it to you.

THE COURT: Sure.

MR. GRAEFF: In Dennis, the officers made an observation. The threshold issue was because they can only see an "object," is that probable cause?

The motion was granted at the trial level, and the Superior Court basically reversed and said the fact that the officers can only articulate the word "object" as opposed to "vial," where it used to be fatal is no longer fatal. That's the bottom line.

That's the issue here, was there full-blown probable cause to approach the defendant and look in his pants? Under this case there is. Because the Court focused on the totality of the circumstances, as opposed to just being able to say, Could you see a vial or could you see an object?

The officer in this case, the evidence is clear, he told the Court as

he did his first opportunity to testify live, he's never said anything different, it's a vial. When I first saw it, it is an object.

Now, what's more important is the question I asked him after that which is, "Based on your experience, what did you think was happening?" And that is, "I thought it was a drug deal."

"What did you think was in his hand?"

"Vials.

"Why is that?

"Because I've seen that a hundred times or more."

Also the question, "Is it a known drug area?

"Yes."

Therefore, his experience is telling him that more likely than not his observations are true.

That leaves me exactly with what the Court said, when we examine a particular situation to determine if probable cause exists we consider all the factors and their total effect.

We do not concentrate on each individual element, we focus on the circumstances as seen through the eyes of a trained police officer. We do not view the situation as an average citizen might.

Finally, remember that in dealing with questions of probable cause we're not dealing with certainties. We're dealing with factual and practical considerations of everyday life on which reasonable, prudent men act.

The courts of the commonwealth have repeatedly emphasized that determinations of probable cause must be based on common sense, non-technical analysis.

The Court goes on to say, Your Honor, that the Court below when it was granted indicated that such behavior as testified to by this officer in that case, or, again, they said "money" for an "object," is consistent with non-criminal explanation.

It doesn't matter in a motion to suppress, this is again incorrect. Probable cause exists when criminality is one reasonable inference. It need not, or most likely need not be the only inference.

So you can stand up here all day and say, Hey, he could have been selling Aspirin, or he could have been taking money for something else, but that's not the issue.

All you have to decide is based on his eyes whether he thinks at Mutter and Cambria, in the 25th Police District, in North Philadelphia, being there for five

years, making forty drug arrests and seeing one hundred exchanges of drugs in his career as a police officer, considering the area, when he sees that exchange on the street whether that is consistent with criminal activity. If it is, then he's allowed to search the defendant. And, lo and behold, if you want to boot-strap it, he found exactly what he thought he saw.

And I will offer the boot-strap argument that he found it, and, therefore, what he saw was completely consistent with his experience.

That's why the commonwealth in Commonwealth versus Dennis was appealed. That's why it came back the way it did. It is a 1992 case.

The drugs in this case should not be suppressed, Your Honor.

THE COURT: Can I take a look at it, please?

MR. GRAEFF: Yes, sir.

THE COURT: Anything else anybody else wants to say?

MR. GRAEFF: As you can see, the Court considered the totality of the circumstances.

The flight, I suggest to the Court that we have another variable which I would substitute since you don't have flight here, but you have this officer's experience, and the known drug area which is different.

But another factor that may not have existed there and again goes into the whole equation of the totality. So you don't have one, but you have the other.

I would suggest to the Court the evidence is just as strong, if not stronger.

THE COURT: All right. I'm willing to accept the officer's testimony as the

facts of the case. It is relatively straightforward.

With respect to the objects being white or not, I think I can just say that I find as a fact that the objects observed were on the line of whitish, or non-descript, as opposed to having a particular color. Not necessarily white, but just as opposed to having a particular color, and I would find that as a fact.

I believe that Dennis does not change the law cited by the commonwealth.

The important thing in Dennis were multiple complaints from the neighbors concerning a particular house and flight into the house upon the officers' arrival.

That is what changes the prior law, not what happened in this case.

Would you want a thirty-day date?

Based on that, it is my conclusions of law that there was not probable cause to arrest; that there was an arrest and seizure from the person that is protected by the Fourth Amendment; that the officer did not have sufficient information to do what he did.

Do you want a thirty-day date?

MR. GRAEFF: Please, Your Honor.

THE COURT: A thirty-day date would be June 23rd. So let's look at June 24.

How about that date, one day after the thirty days?

MR. GRAEFF: That's close enough. Thank you.

615, Your Honor?

THE COURT: No, 475 should be safe for this one.

June 24th, which should be thirty-one days from today's date.

I would like the conditions of release to remain the same.

What are the conditions of release?

MS. MCCARTNEY: At this time I don't believe there is bail on this case. However, the defendant is being held on a state parole detainer.

THE COURT: The conditions of release will remain the same.

Mr. Albino -- Miss Garayua, please interpret for me.

I know exactly why the police officer did what he did. I, however, have found that the case law of this jurisdiction requires him to have had a little bit more information before he did what he did.

The commonwealth has a right to appeal my decision to the Superior Court of Pennsylvania within the next thirty days. So we will meet back here again in thirty-one days.

If they have appealed it, then I will most likely arrange some type of

condition for release which would allow you to get out of jail on this matter.

If they do not appeal it, then most likely at that time they will drop the charges. So we will find out what happens in thirty-one days.

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(3)

NO. 95-718

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF PENNSYLVANIA, Petitioner

VS.

RUDOLPH ALBINO, Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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RESPONDENT'S BRIEF IN OPPOSITION

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December 3, 1995

35 pp

QUESTION PRESENTED

Did the suppression court correctly apply federal fourth amendment law when it ruled that the police lacked probable cause to seize a change purse from respondent based on an observation of a single exchange of money for small "objects"?

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STATEMENT OF THE CASE

On September 8, 1992, respondent, Rudolph Albino, was arrested and charged with possession of a controlled substance with intent to deliver. On May 24, 1993 a motion to suppress for lack of probable cause was litigated before Philadelphia Common Pleas Court Judge Albert John Snite, Jr. The Court, finding no probable cause, granted the motion. The Commonwealth appealed and the Superior Court of Pennsylvania reversed. Commonwealth v. Albino, 432 Pa.Super. 565, 652 A.2d 953 (1995). A petition for allowance of appeal was filed in the Supreme Court of Pennsylvania. The Supreme Court granted the petition and reversed the Superior Court in a per curium order, reinstating the trial court's suppression order. Commonwealth

v. Albino, ___ Pa. ___, 664 A.2d 84 (1995).

On the afternoon of September 8, 1992, Philadelphia Police Officer Gregory Meissler, using field glasses, observed Albino standing a block away, at 2900 North Mutter Street (Pet. app. 48-49). A woman whose identity was never discovered was seen giving Albino some money. Albino then took a brown purse from the waist of his pants and gave "objects"[1] to

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[1] At the suppression motion, Meissler initially said the objects were "white" (Pet. app. 49). On cross-examination however he was impeached with his preliminary hearing testimony wherein he failed to ascribe any color to the objects stating only, "I couldn't tell exactly what they were" (Pet. app. 60). Judge Snite resolved this inconsistency as follows: "With respect to the objects being white or not, I think I can just say that I find as a fact that the objects observed were on the line of whitish, or non-descript, as opposed to having a particular color. Not necessarily white, but just as opposed to having a particular color, and I would (continued...)

the woman who then left the area (Pet. app. 49-50, Opinion of the Trial Court, Pet. app. 20-21). When asked if he could tell what the objects were he replied, "For a fact, no." Nevertheless Meissler, "engaged in the often competitive enterprise of ferreting out crime,"[2] expressed his belief that drugs were being sold (Pet. app. 52). Following his

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[1](...continued)
find this as a fact" (Pet. app. 73). In his opinion Judge Snite reaffirmed his finding that the suppression testimony regarding "white" objects was incredible, referring specifically to the officer's preliminary hearing testimony where it was conceded the objects could not be identified. Opinion of the Trial Court, Pet. app. 21, n.2. The impeachment by his own inconsistent testimony gave the trial court ample grounds to reject as incredible this portion of the officer's testimony, and supports his factual finding that the object observed by the officer was "non-descript, as opposed to having a particular color".

[2]Johnson v. United States, 333 U.S. 10, 14 (1948)

observation, Meissler seized the purse from Albino, recovering eighteen vials of cocaine.[3] Thirteen dollars were also recovered (Pet. app. 55).

Meissler claimed to have participated in an estimated forty narcotics arrests in this area over a five year period. There was no testimony as to the statistical significance of this figure in relation to city-wide averages or whether this part of the neighborhood qualified as a "high crime" or "high drug" area.

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[3] After patting Albino down the officer "pulled open his front pants a little bit." Seeing the purse, he instructed Albino to produce it (Pet. app. 53-54).

REASONS WHY THE PETITION SHOULD BE DENIED

THE SUPPRESSION COURT CORRECTLY APPLIED FEDERAL FOURTH AMENDMENT LAW WHEN IT RULED THAT THE POLICE LACKED PROBABLE CAUSE BASED ON AN OBSERVATION OF A SINGLE TRANSACTION INVOLVING AN EXCHANGE OF CASH FOR SMALL UNKNOWN "OBJECTS."

A. Petitioner misrepresents the operative facts by claiming the arresting officer observed the exchange of "white" objects for money where the suppression court's factual findings, binding on the state reviewing courts, specifically rejects the testimony that the officer could discern the color of the objects exchanged.

The District Attorney of Philadelphia continues to stubbornly argue a version of the facts rejected by both the suppression court and the Pennsylvania appellate courts, a version reached only by employing an improper standard of review. The suppression

court, in granting the motion, found the arresting officer to be incredible on a crucial aspect of his testimony: whether he saw the exchange of "white" objects for money or merely a single commercial transaction of unknown objects. Contrary to state law on standards of review, the Philadelphia District Attorney disregards these findings and claims as "fact" assertions that were contradicted at the suppression hearing and ultimately rejected by the fact-finder, the suppression court. Once the proper standard of review under state law is employed the operative facts are that the arresting officer could not ascertain the color of the objects he observed and saw

nothing more than a single commercial transaction of unknown objects.[4]

The standard of review in Pennsylvania for a Commonwealth appeal from an adverse suppression ruling is as follows:

> [W]here the Commonwealth is appealing the adverse decision of a suppression court, a reviewing court must consider only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted. To hold otherwise would make a mockery of the suppression court and place an impossible burden on every defendant regardless of his success or failure at the suppression hearing.

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[4] Although the Supreme Court did not issue an opinion, in both the suppression court and Superior Court opinions the factual recitations refer to the items as "objects" and did not ascribe any color them, white or otherwise. Pet. app. 5 and 21.

Commonwealth v. Robinson, 518 Pa. 156, 159-60, 541 A.2d 1387, 1389 (1988) (citation omitted); Commonwealth v. Webb, 491 Pa. 329, 421 A.2d 161 (1980). Moreover, the trial court's determination must be viewed in the light most favorable to the prevailing party. Commonwealth v. Robinson, 518 Pa. at 159, 541 A.2d at 1388 (1988); In the Interest of M.W., 418 Pa. Super. 73, 613 A.2d 577, 578 (1992).

At the suppression motion, the arresting officer testified the objects he observed were "white" (N.T. 9). As the Commonwealth notes, the acceptance of this testimony was important to its claim the search was lawful because cocaine is an off-white substance and the observation of small "white" objects would therefore have lent factual support

to the officer's conclusions. Writ of Certiorari, 11, n.1, 21.

On cross-examination, however, the officer was promptly impeached with his prior sworn testimony from the preliminary hearing where he failed to ascribe any color to the objects.[5] Additionally, in that prior testimony, the officer was specifically asked whether he could "make out what the objects were." His reply was, "Not really." Pet. app. 58-60.

Judge Albert John Snite, Jr., of the Philadelphia Court of Common Pleas resolved this factual dispute against the Commonwealth. First in open court, with the witnesses present, he rejected the

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[5] Defense counsel, referring the officer to his prior sworn testimony asked, "You did not mention 'white', did you, 'white objects.'" The reply was, "No, I did not." Pet. app. 59.

officer's claim that he could ascertain the color of the objects: "With respect to the objects being white or not, I think I can just say that I find as a fact that the objects observed were on the line of whitish, or non-descript, as opposed to having a particular color. Not necessarily white, but just as opposed to having a particular color, and I would find this as a fact".[6] Pet. app. 73.

Any remaining question that these remarks represented an unqualified rejection of the disputed testimony is resolved by reference to the suppression court's recitation of the facts in its

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[6] The court's statement "whitish or non-descript, as opposed to having a particular color" is apparently the source of petitioner's claim the court in fact credited the disputed testimony. It does so only by quoting the word "whitish" out of the context of the entire phrase.

opinion. Under the section entitled "Factual History" the trial court found the officer saw only that the defendant "removed a brown purse from the waist of his pants and handed the woman objects from the purse." Pet. app. 21 (emphasis supplied). In a footnote the court explained why it declined to accept the officer's assertion he could see the color of the items, citing to his inconsistent prior sworn testimony.

> Officer Meissler testified at the May 24, 1993 hearing that the Defendant handed the black female "white objects". (N.T. 9). However, on cross examination he conceded that at the Preliminary Hearing on September 16, 1992 he only testified to seeing the defendant hand the woman "objects" and could not identify what those objects were from his vantage point. (N.T. 14-17).

(Trial court opinion, Pet. app. 21, n.2).

The impeachment by his own inconsistent sworn testimony prompted the court to reject as incredible that portion of the officer's testimony where it was claimed he could ascertain the color of the items.

Ignoring here, as it did below, the standards of review applicable in the Commonwealth of Pennsylvania, the Philadelphia District Attorney continues to claim as fact that the officer could ascertain the color of the objects and to invoke this "fact" in support of its petition (Pet. app. 8-9, 9, 21, 24, 26). Under state law, a reviewing court is bound by the suppression court's finding of fact if the evidence so supports. Commonwealth v. Patterson, 488 Pa. 227, 234-35, 412 A.2d 481 (1980). The officer was impeached with his own prior sworn testimony and the trial court invoked

these contradictions in rejecting what charitably could be described as inaccurate testimony, but in the context of the record could justifiably be deemed perjurious.[7]

The suppression court found the officer observed nothing more than a single commercial exchange of an unknown object retrieved from a change purse and

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[7] It is troublesome to respondent that the District Attorney of Philadelphia would seek review of a case where the suppression court was compelled question the credibility of a police officer's sworn testimony. One would expect that under these circumstances it would have been more appropriate to vigorously investigate the arresting officer here to see if in fact a crime had been committed. Rather it spent much of its resources in ignoring the fact that the suppression court rejected the testimony as incredible, twisting the comments of the court to claim it was not really an adverse finding, and protesting the suppression court's reliance on the prior sworn testimony to disbelieve the officer.

thus any probable cause analysis must be based on these operative facts.

B. Contrary to the District Attorney of Philadelphia's assertions, the appellate courts of Pennsylvania have consistently and accurately applied the federal probable cause standard and have provided sufficient guidance to law enforcement and the lower courts in the application of the standard.

The District Attorney of Philadelphia baldly asserts that "in Pennsylvania today . . . the standard for probable cause approaches the arbitrary. The result is a state Fourth Amendment jurisprudence that is an analytical vacuum which serves neither to guide police nor to protect individual rights." Writ of Certiorari, 28. Yet, petitioner fails to cite a single case as an example of this supposed failure. Rather, the many Pennsylvania cases addressing observed street transactions are

remarkable only for their accuracy, consistency, and ease of application.

The Pennsylvania Supreme Court did not issue an opinion in this case but rather, in a per curium order upholding suppression, cited to Commonwealth v. Banks, 540 Pa. 453, 658 A.2d 752 (1995), which it had issued a few months earlier. Banks involved virtually identical facts to this case, a single transaction of an unidentifiable object for money.[8] There the police observed the defendant take an unknown object from his pocket and give it to a female in exchange for currency. The defendant fled upon seeing the police

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[8] The district attorney inexplicably claims it was confused by this citation. It should come as no surprise that cases involving similar facts are similarly resolved. The Supreme Court, rather than reissue an opinion identical to Banks simply reversed per curium citing to its own controlling precedent of three months standing.

but was soon apprehended.[9] The police searched him and recovered contraband from a brown paper bag. Banks, 658 A.2d at 752.

It began its analysis by citing Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983): "Probable cause justifying a warrantless arrest is determined by the 'totality of the circumstances.'" Banks, 658 A.2d at 752-53.

Reviewing the facts, it found the officer saw "nothing more than a single isolated exchange of currency for some unidentified item or items, taking place on a public street corner at midday, and where appellant fled when approached by

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[9] Whereas flight was a factor in Banks, it does not obtain in this case. The fact of flight in Banks is the sole meaningful distinction between the cases.

the officer." Banks, 658 A.2d at 752. Noting, "Every commercial transaction between citizens on a street corner does not give rise to probable cause," id. at 753, quoting Commonwealth v. Lawson, 454 Pa. 23, 29, 309 A.2d 391, 394 (1973), it found the officer's observations, even coupled with flight, were not sufficient. Id. See also Commonwealth v. Greber, 478 Pa. 63, 385 A.2d 1313 (1978) (no probable cause where at a bowling alley in a high crime neighborhood occupants of car handed defendant brown paper bag which he sniffed and then retrieved what appeared to be a wallet or billfold from his pocket); Commonwealth v. Malson, 434 Pa. Super. 155, 642 A.2d 520, 525 (1994) (no probable cause where defendant exchanged item retrieved from a change purse for what appeared to be money; "no citizen may be arrested merely for passing an

unidentified item to another citizen on a public street . . . [T]here must be other facts which, together with a suspicious exchange of unidentified items, supports a reasonable belief that the exchange is drug related").

Where, however, there is something more than a single commercial exchange of an unknown object Pennsylvania courts have not been hesitant to find probable cause. In Commonwealth v. Lawson, 454 Pa. 23, 309 A.2d 391 (1973) the police observed a husband and wife team at work. The two were stationed outside a bar near midnight. The husband would take the money, go to his wife standing nearby, whereupon she would retrieve from her bosom a "dark sack." From the sack an "item" would be handed to the husband who in turn handed it to the buyer. The husband pocketed the money. After

observing three such sales, the backup team was advised and pulled up to the bar in an unmarked car. The pair "quickly entered the bar," the husband remaining in the doorway "blocking the entrance." 309 A.2d at 392-93.

The Lawson Court began stating the probable cause standard: "Probable cause exists if the facts or circumstances known to the officer warrant a prudent man in believing [an] offense has been committed." 309 A.2d at 395, quoting United States v. Henry, 361 U.S. 98 (1959). The Court, articulating its task, said: "All of the detailed facts and circumstances are important: the street location is important; the use of a street for commercial transactions is important; the number of such transactions is important; the place where the small items were kept by one of

the sellers is important; the movement and manners of the parties are important." 309 A.2d at 394.

In Lawson, the police could not see what was being exchanged by the husband and wife team. They observed however not one but three successive sales made under the same suspicious circumstances: the late hour; the location (a bar where presumably potential customers gather); the secreting of the items by the wife; the calculated manner in which the husband dealer ensured no items were on his person; and the attempt to evade the police when they were approached. Under the totality of the circumstances the Lawson court found enough to support probable cause.

Likewise, if the police actually observe contraband or packaging commonly associated with the sale of drugs,

Pennsylvania courts have found this will support probable cause. See Commonwealth v. Burnside, 425 Pa. Super. 425, 625 A.2d 678, 681 (1993) ("exact type of packets used by local narcotics dealers when selling cocaine"); Commonwealth v. Mallory, 418 Pa. Super. 614, 614 A.2d 1174 (1992) (plastic baggies); Commonwealth v. Kendrick, 340 Pa. Super. 563, 490 A.2d 923 (1985) (black film canister).

The line of Pennsylvania cases controlling observed transactions does far more than pay "lip service" to this Court's enunciation of the probable cause standard. It provides clear, concrete and easily applied criteria. A single commercial transaction of unknown objects is insufficient but if coupled with additional facts, such as multiple transactions under suspicious

circumstances, it may be sufficient. If the officer actually observes the contraband or packaging commonly associated with the drug trade, Pennsylvania courts have invariably found probable cause.

The District Attorney claims the Supreme Court's ruling in this case is "thoroughly out of step with the Fourth Amendment jurisprudence that has developed nationally on this question." Writ of Certiorari, 31. Every case it cites however is distinguishable in that each presents something more than a single observed commercial transaction involving an unknown item.

People v. McRay, 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015, did not involve the exchange of unknown objects but rather glassine envelopes, packaging commonly associated with heroin. Under

Pennsylvania fourth amendment interpretations, the observation of such packaging is tantamount to observing the drug itself and any ensuing search would be upheld.

Commonwealth v. Santaliz, 413 Mass. 238, 596 N.E.2d 337 (1992) involved a single transaction of an unknown object but the buyer suspiciously arrived in a taxi, the defendant was used as an intermediary in the sale for his accomplice who had secreted the drugs in her waist, and the sale was consummated without a word being spoken. These additional facts were sufficient to elevate any suspicions to probable cause, much like the additional facts in Lawson, supra, provided probable cause even though it could not be ascertained what was exchanged.

In Ellis v. State, 573 So.2d 724 (Miss. 1990), the police observed the defendant on the steps of a warehouse. He then removed a blue bag from his waist, leaned into a car and made what the officer believed to be a transaction. When the officer approached to investigate the bag had been secreted down the front of the defendant's pants, a fact evidenced by a noticeable bulge. The Mississippi court found these circumstances, taken together, provided probable cause.[10]

The federal cases cited by the District Attorney likewise have required more than just an exchange of something

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[10] No subsequent court, in Mississippi or elsewhere, has cited Ellis as authority. Compare State v. Ellington, 242 Neb. 554, 495 N.W.2d 915 (1993) (no reasonable suspicion where defendant observed leaning into car with arms extended, notwithstanding high crime neighborhood and experienced officer).

for money. In United States v. White, 655 F.2d 1302 (D.C. Cir. 1981) the police observed a transaction of an unknown object for money. This case however also had the additional facts needed to establish probable cause. The automobile was one they recognized as associated with drug addicts, the transaction involved a "substantial sum of money" and the seller used an intermediary to consummate the sale. 655 F.2d at 1303. A more exhaustive analysis was conducted by the court in United States v. Green, 670 F.2d 1148 (D.C. Cir. 1981), where the defendant retrieved an object from a brown paper bag and then "cupped" his hand, concealing the object from view. After accepting money he returned the brown paper bag his jacket pocket. Upon arrival of the police the defendant fled. Stating "[t]his court has never held the

observance of a suspicious transaction, without more provides probable cause for arrest," id. at 1151, it went on to analyze the other factors present. Taken as a whole, the transaction, the efforts at concealment, the flight and the "notorious" reputation of the neighborhood for drug sales provided probable cause.

As with the Pennsylvania Courts, where little else besides the exchange of unknown objects was observed the other state courts have consistently found no probable cause. See State v. Johnson, 565 So.2d 413, 414 (Fla. Dist. Ct. App. 1990) ("officer's observation of someone handing an unknown object to another and taking back money, without more, does not establish probable cause"); Commonwealth v. Ellis, 12 Mass. App. Ct. 476, 426 N.E.2d 172 (1981) (mere exchange of

object for money without more insufficient for probable cause); People v. Ratcliff, 778 P.2d 1371 (Colo. 1989) (no probable cause where police observed exchange of objects outside bar in high crime area).

The District Attorney also claims this Court's review is required "to provide national guidance on the practical meaning of probable cause itself." Writ of Certiorari, 32. Practitioners of the philosophy of law have a tendency to seek solace in rules that boast of ease in comprehension and application. Indeed, some standards are readily amenable to simple mechanical resolution. At the other extreme, however, we find the "probable cause" standard for which each case presents a unique set of facts and for which no circumstance can be ignored as

insignificant. It is with these difficult, often tedious cases, that the search for simple solutions quickly brings disappointment. The goal of achieving a national consensus on "probable cause itself" is a lofty but ultimately unachievable aspiration. Illinois v. Gates, 462 U.S. 213, 232 (1983) ("probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules")

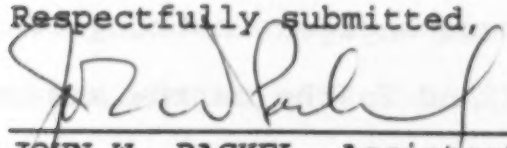
One consequence of having to delve into the minutia of the record so that the "totality of the circumstances" may be fairly assessed is that our common law precedent will rarely give us a completely dispositive answer to the issue at hand. Each case may turn on an event which standing alone would not have warranted even a red pencil

interlineation, but which, when viewed with the whole, may make all the difference. One thing is clear though; our state and federal courts have taken their responsibilities seriously and have almost invariably applied the correct standards and engaged in thoughtful analysis. And in the narrow area of when the observation of a street transaction will give rise to probable cause, they have provided as much guidance and consistency as is judicially possible.

CONCLUSION

Wherefore, for the reasons stated above petitioner's request for writ of certiorari should be denied.

Respectfully submitted,



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Supreme Court, U.S.
FILED
DEC 29 1995
CLERK

(2)

NO. 95-718

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RUDOLPH ALBINO,
Respondent

Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The facts material to the question presented have been set forth in the Petition for Writ of Certiorari. Petitioner files this Reply Brief in response to respondent's Brief in Opposition.

REPLY TO POINTS RAISED IN BRIEF IN OPPOSITION

In its certiorari petition, petitioner noted that this case warrants review because it provides the Court with an opportunity to give national guidance on the practical meaning of probable cause in a common and problematic context -- the typical street corner drug deal. Petitioner also noted that this case was particularly appropriate for consideration because the decision below is wrong, unexplained, and conflicts with the conclusions reached by other state and federal courts facing similar questions.

Respondent makes two arguments in response. First, he accuses petitioner of misrepresenting a material fact. Next, he claims that review is unwarranted because Pennsylvania cases in this area supposedly are remarkably consistent and easy to apply, and because the question of probable cause is fact-specific. These claims are not true. More importantly, respondent's arguments do not remotely diminish the importance of the question presented, or the necessity for this Court's review.

A. Respondent's accusation that Petitioner misrepresented a fact is both false and irrelevant to the question presented for review.

Respondent first attempts to divert the Court's attention away from the issue presented by pretending that the certiorari-worthiness of the case depends upon resolution of a factual dispute. Specifically, respondent accuses petitioner of misrepresenting the facts in stating that the arresting officer was able to ascertain that respondent was selling "whitish" or "non-descript" colored objects.

Respondent's accusation begs the question. The importance of the issue presented, and the necessity for this Court's review, does not turn on whether the officer could "ascertain" the color of the objects. What is important is the commonality of the question presented: the specific facts being whatever they were in this commonly litigated area, did the officer have probable cause to believe he had just seen a drug deal?

That question is raised on a daily basis in courtrooms throughout the nation. It is arguably the most litigated and important Fourth Amendment question of the day. It arises in a myriad of factual circumstances: an officer may or may not be able to detect the color of the object, or the size of the object, or distinctive packaging, etc. These factual variations in no way diminish the importance of the question.

To petitioner's knowledge, this Court has never considered the question of probable cause in this commonly-litigated area. Nor has the Court had an opportunity to provide much practical guidance on

questions of probable cause generally. This case plainly provides this Court with an opportunity to consider what is arguably the most pressing Fourth Amendment question of the day, and thereby to provide further practical guidance on the meaning of probable cause itself.

In addition to being a red herring, respondent's attack on petitioner's presentation of the facts is baseless. Far from "misrepresenting" the factual record concerning the color of the object sold, petitioner quoted the court's finding: e.g., the objects were "on the line of whitish, or non-descript, as opposed to having a particular color." App. 72-73; see Pet. for Writ of Cert., 10. It is difficult to understand how respondent can characterize a verbatim quotation as a "misrepresentation."[1]

Moreover, the suppression court's finding respecting the color of the objects is significant, as it excludes every non-white color in the spectrum. As respondent concedes, crack cocaine is a whitish substance. The color of the objects thus fully supported the officer's belief that respondent was selling cocaine.

Petitioner, in short, was meticulously accurate in reciting the operative facts.[2] Respondent's present,

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[1] Respondent's claim that the suppression court disbelieved the officer's testimony is false. The suppression court specifically stated its acceptance of that testimony "as the facts of the case." App. 72-73.

[2] The counselled respondent's misrepresentations go well beyond mere advocacy, as he adds a gratuitous attack on the arresting officer and petitioner. Brief in Opp. 13 & n.7. These accusations are premised solely on respondent's own false rendition of the suppression court's factual findings.

groundless accusation is nothing but a rather transparent attempt to divert this Court's attention from the importance of the underlying Fourth Amendment question.

B. Review of the question presented here would provide much-needed national guidance on the practical meaning of probable cause.

Respondent next argues that this Court should decline review because Pennsylvania cases in this area supposedly are remarkably consistent and easy to apply, and because the question of probable cause is always too fact-specific to be worthy of review. Both of these claims are unpersuasive.

Respondent's portrayal of the Pennsylvania cases as consistent and principled is insupportable. As petitioner demonstrated in its petition for a writ of certiorari, the recent decisions of the Pennsylvania Supreme Court in this area not only are impossible to harmonize with each other, but are difficult to defend in their own right under any rational approach to probable cause.

Tellingly, respondent himself has acknowledged in this very case the lack of clarity in the law. Respondent lost in the intermediate appellate court, which found probable cause. Respondent then sought discretionary review in the Pennsylvania Supreme Court, arguing that such review was necessary to, inter alia, "provide guidance to the trial courts in [sic] this commonly recurring issue." Pet. for Allowance of Appeal from the Superior to the Supreme Court, 8. The necessity for guidance is no less pressing merely because respondent prevailed in the most recent round of litigation. In fact, since the Pennsylvania Supreme Court chose not to articulate the reasons for its decision, there is an even greater need for guidance now.

Indeed, even justices of the Supreme Court of Pennsylvania do not agree with respondent's new-found assessment that Pennsylvania formulations of probable cause already "have provided as much guidance and consistency as is judicially possible." Brief in Opp., 29. To the contrary, in his recent dissenting opinion in Commonwealth v. West Jones, ___ A.2d ___ (Pa. 1995), No. 3 W.D. App. Dkt 1995 (filed 11/28/95), Justice Cappy, joined by Justice Flaherty, noted that, "[t]he question of what quantum of information is sufficient to establish probable cause has long plagued the judiciary." In short, neither respondent nor the court below could seriously dispute that this Court's discretionary review would be both appropriate and enormously helpful in this area.

Respondent also is mistaken when he asserts that review of this case will be a "tedious" exercise of applying the law to the facts which will not even help to provide "national consensus" on the question of probable cause. Brief in Opp., 28-29. It is not at all apparent why an important constitutional question is undeserving of review merely because it requires an examination of factual circumstances. Whenever difficult-to-describe constitutional standards, such as probable cause, are at issue, the only way to provide guidance is for the Court to provide examples: i.e., "these facts establish probable cause, while these do not." Absent such explication, the "standard" becomes meaningless.

This Court recently has reaffirmed the importance of case-by-case elaboration when constitutional rights and limitations are implicated. Indeed, such a review "may more accurately be described as law declaration than as law application". Thompson v. Keohane, 116 S. Ct. 457, 467

(1995), citing Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 273-276 (1995).

The need for such a declaration is apparent here. The meaning of probable cause is the single most important question under the Fourth Amendment. It is raised and litigated in the context of street drug sales on a daily basis in courtrooms throughout the nation. The unexplained decision of Pennsylvania's highest state court below -- which is thoroughly out of step with the decisions of other state and federal courts which have ruled upon similar questions -- bears witness to the need for guidance from this Court on the question. The need for, and national benefit from, review could not be more apparent.

CONCLUSION

For these reasons, as well as those stated in the petition for writ of certiorari, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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